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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LIONEL FREDRICK JOHNSON, JR., Defendant and Appellant.	E070242 (Super.Ct.No. SWF029110) OPINION

APPEAL from the Superior Court of Riverside County. Elaine M. Kiefer, Judge. Affirmed in part, reversed in part, and remanded with directions.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Robin Urbanski, Donald W. Ostertag, and Yvette Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

In 2009, defendant Lionel Fredrick Johnson, Jr. admitted to police that he had been driving a vehicle that had just crashed into the rear of another vehicle, injuring all five people in it. Defendant was manifestly drunk; he failed sobriety tests.

In 2011, a jury found defendant guilty of several offenses arising out of this incident. Afterwards, one juror told defendant's mother and/or stepfather that the jurors had discussed, during their deliberations, the fact that defendant did not testify. Defendant therefore filed a motion for disclosure of the jurors' personal identifying information. In 2016 — after two prior appeals — that motion was granted.

In 2017, defendant filed a motion for new trial, asserting juror misconduct. In 2018, the trial court held an evidentiary hearing, at which six of the jurors testified. It found that some jurors had committed misconduct by discussing defendant's failure to testify, but also that the resulting presumption of prejudice had been rebutted. Thus, it denied the motion for new trial.

Defendant now appeals a third time. He contends that the trial court erred by denying his motion for a new trial. We must accept, however, the trial court's findings of historical fact, because they are supported by substantial evidence; applying our independent judgment to those facts, we concur that the prosecution carried its burden of disproving prejudice.

Defendant also contends that, in light of the enactment of Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393), he is entitled to a remand for consideration of whether

to strike his two prior serious felony conviction enhancements. The People agree. Accordingly, we will direct such a remand.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Leading up to the Motion for New Trial*.

A jury found defendant guilty of driving under the influence and causing injury (Veh. Code, § 23153, subd. (a)) and driving with a blood alcohol level of 0.08 percent or more and causing injury (Veh. Code, § 23153, subd. (b)). On each count, one enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)) and three enhancements for causing injury to an additional victim (Veh. Code, § 23558) were found true. Two strike priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), two prior serious felony conviction enhancements (Pen. Code, § 667, subd. (a)), and one 1-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) were also found true. As a result, defendant was sentenced to a total of 41 years to life in prison, along with the usual fines, fees, and miscellaneous sentencing orders.

Defendant filed a posttrial motion for disclosure of jurors' personal information. (Code Civ. Proc., § 237.) The motion was based on declarations of defendant's mother and stepfather (the Livingstons), to the effect that, after the verdict, they had a conversation with three of the jurors. One of the jurors was crying; she indicated that at least half of the jurors had "raised the question if [defendant] is innocent why he didn't take the stand to defend himself." The trial court denied the motion.

Defendant appealed, arguing, among other things, that the trial court erred by denying his motion for disclosure. We held that the trial court erred by overlooking the evidence that the jurors had discussed defendant's failure to testify. (*People v. Johnson* (2013) 222 Cal.App.4th 486, 494-498.) We remanded with directions to the trial court to reconsider the motion and to grant it, "unless it finds that the evidence that otherwise supports the motion is not credible." (*Id*. at p. 500.)

On remand, the trial court found that the evidence was not credible; accordingly, once again, it denied the motion.

Defendant appealed again, arguing that, in the first appeal, we erred by allowing the trial court to consider credibility. We agreed; we held that "in deciding whether to hold a hearing on a motion for disclosure of jurors' identifying information, the trial court must assume that the declarations supporting the motion are credible," and "we . . . overrule[d] our previous opinion to the extent that it held otherwise." (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1158; see also *id*. at pp. 1161-1164.) We remanded with directions to the trial court to (re)reconsider the motion. (*Id*. at p. 1165.)

On remand, the trial court held an evidentiary hearing; the Livingstons testified and essentially reaffirmed the contents of their declarations. The trial court then found good cause for disclosure. Four jurors had indicated that they did not want their information disclosed, but the trial court ordered disclosure as to the other eight.

B. *The Motion for New Trial.*

Defendant then filed a motion for new trial, on grounds including juror misconduct. The motion was supported by a declaration by Juror No. 9, who stated: "During the trial I and other jurors did in fact talk about Lionel Johnson not taking the stand in his defense . . . ."

The trial court held an evidentiary hearing on the motion, at which six of the jurors testified. The other six could not be located or were otherwise unavailable.

Four of the jurors — Juror No. 4, Juror No. 6, Juror No. 8, and Juror No. 12 — did not remember any discussion of the fact that defendant did not testify. They could not say definitively that it did not occur; they simply did not remember one way or the other. Of these, Juror No. 4 admitted thinking about it — "I wondered, it did cross my mind, why the defendant did not testify." Juror No. 6, who had been the foreperson, was "sure" that, if anyone brought up something that he felt they were not supposed to discuss, he would have told them not to discuss it. He added: "It's something I would do. I can't say I . . . remember doing it."

Two of the jurors, however — Juror No. 5 and Juror No. 9 —did remember at least some discussion of the fact that defendant did not testify.

Juror No. 5 was evidently the crying juror who had talked to the Livingstons. She testified, "We did discuss it while we were in deliberations . . . ." "[W]hoever was sitting next to me, . . . we looked at each other and we just said, why didn't he stand up for

himself and . . . defend himself?" She did not remember whether any of the other jurors discussed it, and she did not remember it being discussed more than once.

In general, she testified, the foreman was "really good" about "bring[ing] everybody back to let's talk about . . . the evidence . . . ." However, she did not remember him specifically steering them away from discussing defendant's failure to testify.

As a result of the discussion, after the verdict, she "f[elt] like maybe I made the wrong decision." She was "upset." She contacted defense counsel and asked if she could speak to the judge.

Juror No. 9 confirmed that defendant's failure to testify "was part of the discussion . . . ." "[I]t was just curiosity, . . . we just wanted to know . . . why he didn't take the stand." Only "a couple" of the jurors discussed it, though "everybody heard the topic being brought up." The discussion was "short" and not "in[] depth." When asked if the foreperson told them "not to discuss certain things," he said, "[H]e did give us the briefing when we went in there." However, he did not remember the foreperson saying "we shouldn't discuss this or that."

C. *The Trial Court's Ruling Denying the Motion for New Trial.*

At the end of the hearing, the trial court denied the new trial motion.

It explained: "[T]he topic of the defendant's not testifying did come up. That is misconduct. . . . The question is, is it prejudicial?"

It cited *People v. Solorio* (2017) 17 Cal.App.5th 398. *Solorio* had identified three factors to be considered in determining whether the presumption of prejudice had been rebutted: (1) "whether jurors drew adverse inferences of guilt from defendant's decision not to testify" (*id*. at p. 409); (2) "the length of discussion about the topic" (*id*. at p. 410); and (3) "whether jurors were reminded not to consider the defendant's decision not to testify." (*Ibid*.)[1]

Regarding the first factor, the trial court said: "[Juror No. 5] did not indicate that there were negative inferences taken by herself or anyone else from that discussion." "[Juror No. 5] did mention something to the effect of we wished . . . that we had heard from him. That is not the same as drawing a negative inference." "[The discussion] appeared to be . . . limited between [Juror No. 5] and another juror. Maybe other jurors heard it, but there was no inference that that was discussed by anyone other than those two jurors." Likewise, Juror No. 9 did not provide "any evidence of negative inferences . . . ."

It added, "[W]e have an absence of any evidence that there were heated discussions about whether the defendant testified or not. The kind of thing that one would expect jurors might recall if there was further discussion about this topic."

Regarding the second factor, it said: "[Juror No. 5] said it was not a long discussion." "[T]he discussion . . . occurred perhaps one time . . . . And it did not appear

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[1] *Solorio*, in turn derived these factors from *People v. Lavender* (2014) 60 Cal.4th 679. (*People v. Solorio*, *supra*, 17 Cal.App.5th at pp. 408-409.)

to go on at length." Juror No. 9 had similarly testified "that the discussion was very brief."

Regarding the third factor, it said: "[Juror No. 5] specifically remembered the jury foreperson getting them back on topic . . . [a]nd the impression again from that is that the jury did so, they got back on topic."

The trial court concluded "that the presumption of prejudice has been rebutted . . . ."

II

JUROR MISCONDUCT

A. *Evidence Code Section 1150.*

Preliminarily, defendant complains about the trial court's rulings excluding evidence under Evidence Code section 1150.

1. *Additional factual and procedural background*.

The trial court excluded part of Juror No. 9's declaration, based on Evidence Code section 1150.

The motion was also supported by a declaration by Juror No. 11. However, the trial court excluded all of Juror No. 11's declaration under Evidence Code section 1150.

In addition, the motion was supported by a declaration by Attorney Rich Pfeiffer, who had represented defendant in 2016. He related statements that one of the jurors had made to him. The prosecution objected to Pfeiffer's declaration, as hearsay and as

inadmissible under Evidence Code section 1150. The trial court did not expressly rule on this objection.

2. *Discussion.*

Evidence Code section 1150, as relevant here, provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).)

"'This statute distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ." [Citation.] " . . . The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." [Citations.]' [Citation.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1281.)

Defendant disclaims any contention that the trial court misapplied Evidence Code section 1150.[2] Rather, he argues that determining whether the jury misconduct was

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[2] Although the trial court did not rule on the objections to Pfeiffer's declaration, they were well-taken. To the extent that the juror who spoke to Pfeifer

[footnote continued on next page]

prejudicial includes consideration of whether the jurors drew an adverse inference from his failure to testify (see part II.B, *post*), yet Evidence Code section 1150 prevents him from presenting evidence of their subjective thought processes. He concludes that "[a]rguably, [Evidence Code] section 1150 creates an injustice . . . ." We, however, are not empowered to rewrite the Evidence Code.

B. *Prejudice from the Juror Misconduct*.

"'[B]y violating the trial court's instruction not to discuss defendant's failure to testify, the jury committed misconduct. [Citations.] This misconduct gives rise to a presumption of prejudice, which "may be rebutted . . . by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm."' [Citation.] '"Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination."' [Citation.] 'However, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 726-727.)

Defendant argues that the prosecution should be required to rebut prejudice not merely by a preponderance of the evidence, but beyond a reasonable doubt. As he also

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[footnote continued from previous page]
described objectively ascertainable acts in the jury room, her statements were admissible under Evidence Code section 1150 but inadmissible hearsay; conversely, to the extent that the juror described her own subjective mental process, her statements were arguably admissible under a hearsay exception (see Evid. Code, § 1250; but see Evid. Code, §§ 1251, 1252) but inadmissible under Evidence Code section 1150.

concedes, however, Evidence Code section 115 provides that: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." He cites no law holding that the prosecution must rebut the presumption of prejudice from jury misconduct beyond a reasonable doubt, and we have found none.

In a criminal case, "the Due Process Clause protects the accused against *conviction* except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364, italics added.) Other facts, however, need only be proven by a preponderance. (E.g., *People v. McCurdy* (2014) 59 Cal.4th 1063, 1106 [other crimes, when admissible under Evid. Code, § 1101, subd. (b), must be proven by a preponderance]; *People v. Arriaga* (2014) 58 Cal.4th 950, 955, 963 [fact that defendant was duly advised before entering guilty plea must be proven by a preponderance]; *People v. Sapp* (2003) 31 Cal.4th 240, 267 [voluntariness of a confession must be proven by a preponderance].)

We also note that, even assuming the beyond a reasonable doubt standard did apply, defendant could not show that the trial court erred. "'[A]n order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.) Here, the trial court did not specify what standard of proof it was using. Thus, defendant can hardly show that it used an erroneous one.

Defendant also complains that, due to the passage of time, the six jurors who did testify had little recollection of their deliberations, and the other six jurors had become

unavailable. He blames the delay on "repeated judicial error" — i.e., the trial court's erroneous denial of his motion for disclosure of personal juror information, along with our error in his first appeal in stating the standard for the consideration of that motion. It is not entirely clear, however, what he wants us to do about it (except, perhaps, to grant a new trial automatically — a remedy for which he cites no authority, and which we decline to adopt). Given that it was the *prosecution's* burden to *disprove* prejudice, it would seem that missing evidence and faded recollections would be more likely to handicap the prosecution than the defense.

Defendant does not argue that the trial court erred by analyzing the testimony through the lens of the *Solorio* factors. He does argue, however, that with respect to each of these factors, the trial court erroneously required him to prove prejudice, instead of requiring the prosecution to disprove prejudice.

The first factor is whether jurors drew an adverse inference of guilt from defendant's failure to testify. Defendant points to the trial court's statement that Juror No. 5 and Juror No. 9 did not testify to drawing any "negative inferences" as placing the burden of proof on him. The trial court, however, was careful to explain that, if the jurors did consider defendant's failure to testify to be material to guilt, it would be reasonable to expect them to remember that: "[W]e have an absence of evidence that there were heated discussions about whether the defendant testified or not. The kind of thing that one would expect jurors might recall if there was further discussion about this topic." It

properly concluded that the prosecution met its burden by showing that the jurors did not recall any such discussion.

The second factor is the length of discussion about the topic. Defendant argues that the trial court improperly found that the discussion was short only because "there was no evidence the comments were more than transitory . . . ." Not so. Two jurors affirmatively testified — as the trial court noted — that the discussion was "short." "[W]e didn't go into depth[,] it was just something that was briefly brought up." "It was so brief that I . . . don't believe it was brought up more than once." The other four jurors did not even remember the discussion. "The fact that only a few jurors recall any comment on the topic may tend to 'indicate[] that the discussion was not of any length or significance.' [Citation.]" (*People v. Solorio*, *supra*, 17 Cal.App.5th at p. 410.)

The third factor is whether jurors were reminded not to consider the defendant's decision not to testify. Defendant claims the trial court reasoned that "there was no evidence that the foreperson *did not* admonish the jurors . . . ." Again, not so. While the foreperson did not specifically remember admonishing the jury, he did testify that he was "sure" that he would have done so; "It's something I would do." Likewise, Juror No. 5 testified that "generally, the foreman would . . . bring everybody back to let's talk about . . . the evidence and move forward. . . . I remember him . . . trying not to go on tangents." "He was really good at that." The trial court could reasonably conclude that, if the topic of defendant's failure to testify was discussed at all, the foreperson did admonish the jurors.

Separately and alternatively, even if the foreperson did not admonish the jurors, prejudice was nevertheless rebutted.

"'"'Transitory comments of wonderment and curiosity" about a defendant's failure to testify, although technically misconduct, "are normally innocuous . . . ." [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 59.) "It may often be the case, though, that juror comments that go beyond mere wonderment and curiosity may need stronger affirmative evidence — such as a reminder of the court's instructions not to consider the forbidden topic — to show that prejudice does not exist." (*People v. Lavender*, *supra*, 60 Cal.4th at p. 690.)

The evidence here showed no more than such "transitory comments of wonderment and curiosity." Juror No. 5 described the discussion as asking "[W]hy didn't he stand up for himself and . . . defend himself?" Juror No. 9 specifically described it as expressing "just curiosity." Neither of them recalled any statement that the jurors should draw an adverse inference from defendant's failure to testify. We conclude that such a discussion was "innocuous." (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1425 [presumption of prejudice was rebutted where discussion of defendant's failure to testify was brief and did not involve drawing negative inferences].)

Defendant also cites testimony from which the trial court arguably could have drawn different conclusions with respect to some of the *Solorio* factors. As already mentioned, however, we accept the trial court's findings on questions of historical fact, as long as they are supported by substantial evidence. This means the trial court's

resolution of conflicts in the evidence is binding on us. (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; cf. *People v. Wall* (2017) 3 Cal.5th 1048, 1062 [it is up to the trial court to resolve juror's conflicting answers on voir dire].)

For example, defendant points out that Juror No. 8 remembered the foreperson admonishing the jury only once, about a different issue. The trial court, however, could have viewed this as supporting the other evidence that the foreperson *did* admonish the jury whenever it was necessary.

He also cites the testimony of Juror No. 9 that the discussion of defendant's failure to testify "wouldn't have even been five minutes [long]." Defendant concludes that it may have been as long as five minutes. However, this did not contradict the evidence that the discussion was short. The trial court could reasonably find that it was only transitory.

Similarly, he cites Juror No. 5's testimony that "the discussion about defendant not testifying" was "the reason why we reached the verdict of guilty . . . ." The trial court, however, cut her off at that point, saying, "I don't want you to go into that. We can't go into . . . your mental processes . . . ." This testimony was inadmissible under Evidence Code section 1150; clearly the trial court knew that.[3] Even in the absence of an objection, the testimony was irrelevant. (*People v. Steele* (2002) 27 Cal.4th 1230, 1264.)

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[3] It also lacked foundation, given that Juror No. 5 did not remember anyone discussing defendant's failure to testify, other than herself and the juror next to her.

In the same vein, he cites the testimony of Juror No. 5 that "a lot of times," the jurors "brought the conversation back to let's just take a look at the evidence . . . ." Defendant concludes that *the topic of him not testifying* must have come up "a lot of times." Juror No. 5 also testified, however, that she could not remember what — if anything — the other jurors said about defendant's failure to testify. In context, she was speculating that they may have said that they should just look at the evidence, as this was said "a lot of times" about *other topics* during the deliberations.

Finally, defendant relies on the testimony that his mother and stepfather gave at the hearing on his motion for disclosure of jurors' personal information. We may assume, without deciding, that the trial court could have considered this testimony; however, it was not required to do so, because the testimony was not introduced in connection with the motion for new trial, nearly two years later.

III

SENATE BILL NO. 1393

Defendant also contends that, in light of the enactment of SB 1393, we should remand to allow the trial court to exercise its discretion with respect to striking the prior serious felony conviction enhancements.

As mentioned, the jury found two prior serious felony conviction enhancements true. (Pen. Code, § 667, subd. (a).) As a result, the trial court imposed two consecutive terms of five years each.

When defendant was sentenced, the trial court had no power to strike a prior serious felony conviction enhancement. (See Pen. Code, former § 1385, subds. (b), (c)(2), Stats. 2014, ch. 137, § 1.) On January 1, 2019, however, while this appeal was pending, SB 1393 went into effect. (Stats. 2018, ch. 1013.) As a result, a trial court now has discretion to strike a prior serious felony conviction enhancement. (*Ibid*.)

Defendant argues that he is entitled to the benefit of this ameliorative change in the law. The People concede the point, and we agree. Absent some indication of a contrary legislative intent — and we have not found any here — "'[a]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date' [citation] . . . ." (*People v. Dehoyos* (2018) 4 Cal.5th 594, 600; see also *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-973.)

Finally, the People do not argue that it would be an abuse of discretion to strike the prior serious felony conviction enhancements. Accordingly, we will remand with directions to consider whether to strike these enhancements. We express no opinion on how the trial court should exercise its discretion.

IV

DISPOSITION

The judgment with respect to the conviction is affirmed. The judgment with respect to the sentence is reversed, subject to the following directions. On remand, the trial court must exercise its discretion with respect to whether to strike one or both of the

prior serious felony conviction enhancements. If it does not strike any of these enhancements, it must reimpose the same sentence. If it does strike one or both of these enhancements, it must resentence defendant.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.